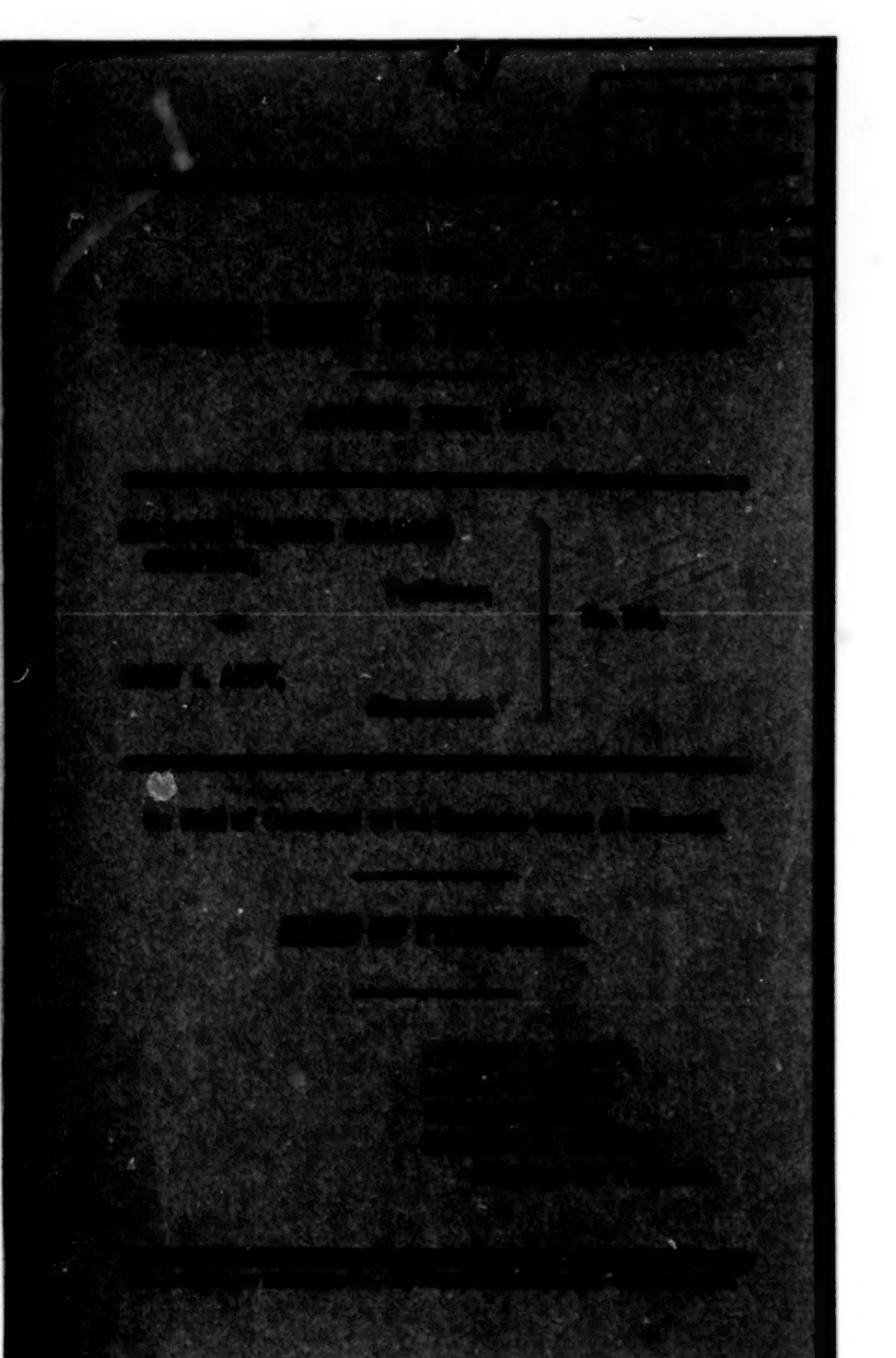

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
MARY I. AEBY,
Respondent.
No. 100.

On Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF PETITIONER.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED.

This case is in this court on writ of certiorari, granted on October 25, 1926, to review the judgment of the Supreme Court of the State of Missouri, affirming a judgment of the Circuit Court, City of St. Louis, Missouri, in favor of respondent and against petitioner, in the sum of

fifteen thousand dollars ($15,000.00) for damages for personal injuries alleged to have been sustained by respondent while in the employ of petitioner (R. 9), the case involving the construction and application of the Act of Congress, known as the Federal Employers Liability Act.

REFERENCE TO REPORT OF OPINION OF COURT BELOW.

The opinion of the Supreme Court of Missouri will be found in Volume 313, Missouri Supreme Court Reports, at page 492, and also in 285 Southwestern Reporter, at page 965.

DATE OF JUDGMENT TO BE REVIEWED.

The judgment of the Supreme Court of Missouri was rendered on April 5, 1926 (R. 118).

The opinion of that Court will be found in the record beginning at page 118 and ending at page 132.

A motion for rehearing was duly filed in said Supreme Court of Missouri (R. 132), which motion was overruled on May 28, 1926 (R. 132).

The judgment having been rendered by one of the two divisions of said court, motion was duly filed, praying for an order transferring said cause to said Supreme Court of Missouri en banc, for further consideration (R. 133), which motion was overruled on May 28, 1926 (R. 134).

THE JUDGMENT, SOUGHT TO BE REVIEWED, IS A FINAL JUDGMENT.

The Supreme Court of the State of Missouri is the court of final appellate jurisdiction in all cases brought for the recovery of damages for personal injuries wherein the amount of the judgment appealed from is in excess of the sum of seven thousand five hundred dollars ($7,500.00). The amount of the judgment, in this case, is in excess of that sum, to wit, the sum of fifteen thousand dollars ($15,000.00) (R. 1).

The decision of the Supreme Court of Missouri was one affirming the judgment (R. 188). If that affirmance is upheld by this Court the litigation is ended and nothing remains to be done by petitioner but to satisfy the judgment by the payment of the amount thereof with interest and costs.

The decision in this case was rendered by Division No. 2 of the Supreme Court of Missouri (R. 118).

The opinion was written by one of the Commissioners of that division and was unanimously adopted and concurred in by the Judges thereof (R. 132).

Petitioner filed a motion for rehearing which was overruled (R. 133). Thereupon, by way of exhausting all possible remedies, petitioner filed its motion to transfer the case to the court en banc in an effort to have the case decided by the entire membership of the court. This motion was overruled (R. 133).

CLAIMS ADVANCED AND RULINGS MADE IN THE LOWER COURT.

As stated in the opinion of the Supreme Court of Missouri, "respondent sued petitioner under the Federal Employers' Liability Act for damages for personal injuries sustained by her while employed by petitioner as a station agent" at Magness, a small village of about 400 inhabitants, on one of the lines of petitioner's railroad in the State of Arkansas. The jury returned a very substantial verdict for respondent, for a portion of which judgment was rendered, which judgment the Supreme Court of Missouri affirmed.

Early in the morning of the day on which she was injured, respondent had pulled a baggage or express truck across the station platform to the edge of the platform adjacent to the track and had there left it in position to receive baggage or express from a train due to presently arrive at that station.

Having thus [illegible]ed the truck, respondent proceeded to walk back across the station platform to the station. When she had about reached the station building, she slipped on some snow or ice which had fallen and formed there during the night and fell, sustaining injuries.

By way of attempting to base her right to recover, if any, upon an alleged violation of the act of Congress, known as the Federal Employers' Liability Act, respond-

ent alleged in her petition (R. 3) that, at the time in question, defendant (petitioner)

> "was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri,"

and that at the time of her injury plaintiff (respondent)

> "was employed by defendant in interstate commerce, to wit, as a station agent," etc.

She further alleged that in the performance of her duties she was required to pass over the platform extending from the station to the tracks and that while so doing she fell upon the platform and was injured (R. 3).

Certain specific acts of negligence were then alleged with respect to the construction of the roof of the station and of the platform, permitting rain and snow to accumulate and ice to form thereon, and insufficient lighting of the platform, which allegations were put in issue by petitioner's answer (R. 5 and 6) after it had unsuccessfully interposed a demurrer to the petition upon the ground that same did not state any cause of action (R. 5).

In its submission of this case to the Supreme Court of Missouri, upon the issues raised and upon the entire record of the case, petitioner contended:

First. That neither the pleadings nor the evidence disclosed a state of facts to which the Federal Employers'

Liability Act was applicable or upon proof of which that act authorized a recovery. More particularly this contention was that a station platform was not among the things enumerated in the act for "any defect or insufficiency" in which a railroad company might be held negligent; that the only word in the act which did not definitely exclude a station platform was the word "works," and that when the well-understood meaning and definition of the word "works" was considered it did not include a station platform.

The Supreme Court of Missouri rules against petitioner upon this point, saying:

> "While the station platform may not be embraced within the other words of the act, it would seem that the general term 'works' is sufficiently comprehensive" (R. 124).

Second. That, if the act be held to apply, then there was a failure of proof of actionable negligence on the part of petitioner causing respondent's injuries.

(This station platform was made of chat or gravel. The evidence of respondent herself established that when it rained, the rain falling from the roof of the station would wear a depression, or shallow trench in the chat; that when the rain stopped, the chat would absorb the water; that the rain, which formed the ice, and snow on which she slipped fell during the preceding night, thereby creating a condition which had existed for only a few

hours, during the night. There was no showing that petitioner either knew, or by the exercise of ordinary care could have known, of such condition in time to have, by the exercise of ordinary care, prevented the injury, even if it were its duty to do so.)

The Supreme Court of Missouri decided this point against the contention of petitioner (R. 120 to 123).

Third. That if the facts of this case bring it within said act, then, under the uncontradicted evidence of respondent herself, establishing that she was thoroughly familiar with the existence of all of the conditions which, she claims, caused her injury and that she fully appreciated such risks of danger, if any, as arose by the reason of the existence of those conditions, she assumed those risks and is not, for that reason, entitled to recover.

The Supreme Court of Missouri decided this point against petitioner by applying the rule, relating to assumption of risk, as announced by that Court, and by other courts of the state, rather than the rule announced by this Court, saying:

> "The rule is firmly established in this state that the servant **never** assumes a risk of injury created by the negligence of the master" (R. 125).

In so holding, the decision of said Court is in direct conflict with, and opposition to, many decisions of this Court hereinafter cited, among which is Pryor v. Williams, 254 U. S. 43.

Fourth. That respondent's injuries were solely caused by her own carelessness.

The Supreme Court of Missouri decided this point against petitioner (R. 130 and 131), and, in this respect, the decision is in conflict with the decisions of this Court in the following cases involving this same act:

Great Northern Railway Co. v. Wiles, 240 U. S. 444;
Freese v. Chicago, Burlington & Quincy Railroad Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147.

ACT OF CONGRESS RELIED UPON TO INVOKE JURISDICTION OF THIS COURT.

The particular statutory provisions under which the jurisdiction of this Court is invoked are Sections 1 and 4 of the Act of Congress known as the Federal Employers' Liability Act (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171). This act is set out in full in the appendix, infra. (The amendment to the Act of April 5th, 1910, is not involved.)

The material portions of the act particularly involved in this case are as follows:

Section 1 (in part):

> "That every common carrier by railroad while engaging in commerce between any of the states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death

resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, **or** by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, **works**, boats, wharves, or other equipment."

Section 4:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of any of, its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

For purposes of comparison, the first section of the act, known as the "First Federal Employers' Liability Act," is also printed in the appendix.

CASES DECIDED BY THIS COURT, RELIED UPON TO SUSTAIN JURISDICTION OF THIS COURT OVER THIS CASE.

The cases upon which petitioner relies to sustain the jurisdiction of this Court of this case are those in which this Court has decided that, in a case in which a recovery for damages is sought because of alleged violations of provisions of the Federal Employers' Liability Act, questions with respect to (a) the negligence of the carrier; (b) the

negligence of the injured; (c) assumption of risk of employment by the injured, and (d) the right of recovery, are to be determined by the rules of common law, as announced by this Court, rather than by those rules as declared by the courts of the various states.

Among such cases, which were called to the attention of the Supreme Court of Missouri in the submission of this case, are the following:

Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492;

Jacobs v. Southern Railway Co., 241 U. S. 229;

Pryor v. Williams, 254 U. S. 43;

Patton v. Railway Co., 179 U. S. 658;

Looney v. Metropolitan Railroad Company, 200 U. S. 480;

Boldt v. Pennsylvania Railroad Co., 245 U. S. 441, 62 L. Ed. 385;

Southern Railway Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564;

Great Northern Railway Co. v. Wiles, 240 U. S. 444;

Frese v. C. B. & Q. R. R. Co., 263 U. S. 1;

Davis v. Kennedy, 266 U. S. 147.

Other cases announcing the same principle, not called to the attention of the lower court, are the following:

Chesapeake & Ohio Railway Co. v. De Atley, 241 U. S. 310;

Chesapeake & Ohio Railway Co. v. Proffitt, 241 U. S. 462;

Erie Railroad Co. v. Purucker, 244 U. S. 320;

Chesapeake & Ohio Railway Co. v. Nixon, 271 U. S. 218.

STATEMENT OF THE CASE.

The jurisdiction of this Court is invoked in this case upon the ground that the judgment of the Supreme Court of Missouri, which is final, erroneously interpreted the Act of Congress known as the Federal Employers' Liability Act, and erroneously applied the law interpreting said act, in holding, first, that said act applied to the situation involved in this case; secondly, even if said act may be relied upon for a recovery herein, (a) that the negligence alleged was established by the proof; (b) that respondent did not assume the risk of injury arising from the conditions which existed at the time and place of the accident, and (c) that the sole cause of respondent's injuries was not her own negligence.

The jurisdiction is also invoked upon the further ground that the judgment of the Supreme Court of Missouri, which is final, is in conflict with, and fails to follow, decisions of this Court construing and applying the provisions of said act to facts similar to those established by the proof in this case.

A consideration of the material allegations of respondent's petition and of petitioner's answer may be of assistance in the consideration of the case and we, therefore, here summarize same.

Summary of Respondent's Petition.

The petition first alleged that, at all times mentioned therein, petitioner was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and that, at the time of her injury, respondent was employed by petitioner in interstate commerce; that she was employed as station agent; that it was her duty to go from the station to the trains for the purpose of carrying on the business of petitioner, and that in so doing she was required to pass over a platform extending from the station building to the tracks; that, on the day of the accident (January 13, 1921), in the early morning, before it was fully light, she delivered to a certain train, and received from said train, express, mail and messages, and while returning from said train to the station she fell upon the platform (R. 3).

It was further alleged in said petition that your petitioner was guilty of negligence in that:

(1) Said station platform was not lighted (R. 4).

(2) Said platform was covered with snow, sleet and ice, and one was liable to slip thereon (R. 4).

(3) That the surface of said platform was composed of chat and fine gravel, so loosely put together that depressions, holes and drains would form in it, leaving the surface uneven, slanting, and with ridges and irregular places appearing on its surface (R. 4).

(4) That petitioner did not put or maintain troughs or gutters on its depot building, but allowed the water falling on the roof of said depot to fall on the chat or gravel platform in front of the door and caused said chat and gravel to become loose, so that a depression like a gully or trough formed in front of the depot door. And that the chat or gravel was carried away from in front of the door by persons passing in and out of said depot and the water falling on said depot and said platform flowed toward the depression in front of said door and cut a depression or ditch in front of said door and around the corner of said depot, which ditch or depression had sharp, slanting sides, and also slanted downward toward the end of the depot, and that in cold weather, when rain, snow and sleet fell, ice formed in the bottom and on the sides of said ditch or depression and formed a slick, ice-covered and irregular surface, rendering it dangerous for a person to step into or upon said ditch or its sides (R. 4).

It was further averred in said petition that at the time of her injury the depot platform was dark and unlighted, and that respondent had no knowledge that said depot platform was in the unsafe and dangerous condition aforesaid, nor could she have knowledge of such fact by the exercise of ordinary care, and that, in passing over said platform on said date, she stepped upon and into said ditch or depression and upon the irregular surface of same, which was then covered by a coating of ice, snow

and sleet, and fell violently to the platform, resulting in the injuries complained of (R. 4).

Summary of Answer of Petitioner.

In its answer petitioner admitted that at all the times mentioned in respondent's petition defendant (petitioner) "was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and at all such times the plaintiff was employed by defendant in interstate commerce, to wit, as a station agent at Magness" (R. 5 and 6).

It was further admitted that the train mentioned in the petition to which she was required to deliver, and from which she was required to receive, express and mail was a train which was operated and carried passengers between the City of Newport, Arkansas, and the City of Joplin, Missouri (R. 5 and 6).

These admissions were then followed by a general denial of each and every other allegation in said petition, and, in accordance with the Missouri practice, by affirmative pleas of contributory negligence and assumption of risk (R. 6 and 7).

The Facts.

The facts upon which reliance is based for a reversal of the judgment of the court below are all established by the uncontroverted testimony of respondent herself,

some of them being stated in the opinion of the Supreme Court of Missouri, although there are several facts of material importance to which no reference is made in said opinion. Briefly, they are as follows:

At the time of her injuries respondent was about 34 years of age. Her manner of testifying, as disclosed by many of her answers to questions propounded to her, shows that she was a woman of much more than average intelligence. She had lived, during most of her life, within twenty miles of the station, on petitioner's line of railroad, known as Magness, Arkansas. She first entered the employ of petitioner as ticket agent, at a station called Morefield, about five or six miles from Magness, on March 20th, 1919, where she worked until July 2nd, 1920, when she was transferred to, and began work at, the station at Magness, a small town of about 400 people, her employment there being in the capacity of station agent (R. 11).

Her duties as such station agent were to do the book work, sell tickets and handle the express and freight work (R. 11). At the time of her injury there were four trains which passed that station. One passenger train passed there, northbound, at 6:18 in the morning and one passenger train, southbound, at 6:41 in the evening; then at 8:50 in the morning and at 12:38 in the afternoon two local, or mixed, trains passed through (R. 12).

The station was a small wooden building. At either end of the building and extending out to the track there

was a station platform composed of chat or small gravel. The uncontradicted evidence tended to establish that, when it rained, the rain, falling upon the roof of the station, and "the passage of people in and out of the station" would cause a depression, or small ditch or drain, to wear in the chat (R. 13). This ditch or depression extended across that part of the platform in front of the door leading into the station (R. 13). This condition arose and existed whenever it rained, during the entire time of respondent's employment at this station (R. 28). During all of that time respondent was "practically" in sole charge at this station (R. 26).

Respondent's testimony discloses in considerable detail that she was thoroughly familiar with all of these conditions while she worked at this station. She further paid very close attention to weather conditions in that vicinity, keeping a book in which she made daily entries of those conditions (R. 29).

On the night preceding her injury respondent met the train southbound, due at Magness at 6:41. She received the mail from that train and took it to the village post office. Thereafter, she returned to the station, where she remained all night (R. 30). When she returned to the station the weather was clear; the platform was perfectly dry and there was no accumulation of either water, snow, ice or sleet thereon (R. 30). Some time during the night, however, it first rained, then sleeted, and then snowed (R. 30). Respondent heard the rain and sleet and knew

that during the night those conditions prevailed. She arose the next morning—the morning on which she was injured—and stepped out of the station, walking to one end of it, where she proceeded to get the truck which was kept there for use in handling baggage and express. With the assistance of a companion she pulled it out to the edge of the platform alongside the railroad track, preparatory to meeting the train due there at 6:18 a. m. (R. 30 and 31). As stated, respondent knew that it had sleeted during the night, and that there was snow all over the platform and all over the village, as far as could be seen from the station, as soon as she stepped out of the station and before she was injured (R. 31). When she attempted to move the truck she discovered that it was covered with snow and sleet and she could see that it had rained and frozen on the truck before it snowed (R. 32). She pulled the truck out to the edge of the platform and placed it in its proper position, without any mishap and without the occurrence of anything unusual. Leaving the truck in the position just mentioned, respondent proceeded to walk across the platform towards the station. When she reached the point near the steps leading to the station she slipped on the side of a depression which contained snow or ice, or both, which had accumulated during the night, and fell, sustaining the injuries for which she sued (R. 58).

The evidence is uncontradicted that from the moment

at which respondent stepped from the station to the moment of her fall, she possessed full knowledge of the condition existing on this platform and full appreciation of the risks, if any, incidental to walking across it.

In view of the evidence, it was and is petitioner's contention that for the reasons heretofore outlined, which we shall now discuss a little more fully, respondent is not entitled to recover, and that if the Supreme Court of Missouri had applied the law as declared by this Court to the facts herein disclosed it would have reversed the judgment of the lower court.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri erred in holding that the act of Congress known as the Federal Employers' Liability Act applied to the facts in this case, and that respondent could maintain this action under said act, and that a station platform such as is described in the evidence in this case is among the things for "any defect or insufficiency" in which, due to its negligence, petitioner is liable.

II.

The Supreme Court further erred in holding that the evidence adduced by respondent established the negligence charged against petitioner.

III.

Said Supreme Court further erred in holding that, inasmuch as the evidence tended to establish that petitioner was negligent, as charged, respondent did not assume the risk of injury arising from such negligence, and in further holding and applying the rule upon the subject of assumption of risk, as announced by the Supreme Court of Missouri, instead of applying the rule upon that subject as declared by this Court. In this respect the de-

cision of the Supreme Court of Missouri is in conflict with decisions of this Court as announced in the following cases:

Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492;
Jacobs v. Southern Railway Co., 241 U. S. 221;
Pryor v. Williams, 254 U. S. 43;
Boldt v. Pennsylvania Railroad Co., 245 U. S. 441;
Looney v. Metropolitan Railroad Co., 200 U. S. 480;
Chesapeake & Ohio Railway Co. v. Nixon, 271 U. S. 218.

IV.

Said Supreme Court further erred in not holding that respondent was not entitled to recover upon the ground that her injury was solely due to her own negligence, and in this respect the decision of said Supreme Court is in conflict with the decisions of this Court as announced in the following cases:

Great Northern Railway Co. v. Wiles, 240 U. S. 444;
Frese v. C. B. & Q. R. R. Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147.

SUMMARY OF ARGUMENT AND BRIEF WITH POINTS, AUTHORITIES AND STATUTES RELIED UPON.

I.

The Evidence, in This Case, Fails to Establish Facts to Which the Federal Employers' Liability Act Is Applicable.

It may well be doubted that respondent's petition contained allegations sufficient to bring this case within the provisions of the Federal Employers' Liability Act. Petitioner filed a general demurrer to said petition (R. 5), the ground of which was that same did "not state facts sufficient to constitute a cause of action." This demurrer was overruled (R. 5) whereupon petitioner filed its answer. It was alleged, in respondent's petition, that petitioner was engaged in commerce between states and that she was employed by it in such commerce (R. 3).

These allegations were admitted by petitioner, as they correctly stated the facts. Petitioner was engaged in interstate commerce and the particular train involved in this suit was a train which was operated between the City of Newport, Arkansas, and the City of Joplin, Missouri, and, so far as her general duties were concerned as station agent, we presume it would be said that respondent was employed in interstate commerce.

This petition further alleges (R. 3):

> "That in the discharge of her duty to defendant she did go to said station and delivered to said train and received from said train express, mail, and messages, such as said train delivered and received at said station, and while returning from said train to said station she fell upon the platform," etc.

The duty mentioned in this allegation may have been true as a general proposition, but the testimony of respondent discloses that she did not deliver any express, mail, or messages to this train on the morning of the accident and was not injured while returning to the station after having either delivered to, or received from, said train express, mail and messages. It appears from the evidence (R. 38 and 39) that some mail or express was placed on this truck upon arrival of the train, but a companion of respondent's carried same into the station in her hands. The truck was not moved away from the edge of the platform. At the moment of her injury respondent was not engaged in the performance of any duty for petitioner, for which reason, and for other reasons herein referred to, we contend that the case is not brought within the provisions of the Federal Employers' Liability Act by the facts proved.

The Act of Congress known as the Federal Employers' Liability Act creates two rights of action for damages for injuries suffered by employes of a carrier engaged in in-

terstate commerce, depending upon the agency causing the injuries; first, if the injury results in whole or in part from the negligence of any of the officers, agents, or employes of such carrier; or, second, by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, **works**, boats, wharves or other equipment.

It is not averred in the petition, nor is there any proof, that respondent's injury resulted, "in whole or in part, from the negligence of any of the officers, agents or employes of" petitioner.

If the judgment of the Supreme Court of Missouri can be sustained upon the theory of an alleged violation of any of the provisions of this act, it is because the case comes within the terms of the second clause. Under that clause of the act the injury must have resulted from some "defect or insufficiency, due to the carrier's negligence," in the appliances mentioned in the statute. A station platform is not specifically mentioned therein, nor does any word appear which can be construed to include a station platform, unless it be the word "works," and it is our contention that that word, as used in the statute, pertains to structures owned or operated by the carrier, similar to machine shops, roundhouses or others of like character, and was not meant to include a station platform.

Obviously, this act was passed for the protection and in the interest of persons employed by common carriers by

railroad who are exposed to the hazards directly or indirectly incidental to the work of operating trains.

In the respects by which it changed the common-law rights and obligations of the parties affected by it this act is somewhat drastic. It creates new causes of action and destroys former common-law defenses in bar of such causes of action. It affects the jurisdiction of district courts of the United States.

When the character and purpose of this act are considered, we submit that it was not the intention of the Congress, in so far as that intention may be gleaned from the language of the act, to provide either a new cause of action or to abolish the long-established common-law defenses in bar in favor of one who is injured by reason of the simple accident of slipping on some ice on a station platform, across which the injured person is walking, even though the owner of that platform chances to be a railroad company engaged in interstate commerce, and even though the usual employment of the person injured is in interstate commerce.

After she had completed the act of placing the truck at the edge of this platform and while leisurely walking across the platform upon a mission purely for her own convenience, we submit that respondent was subjected to no greater risk of injury, because of the sole circumstance that the platform was adjacent to a railroad station, than she would have been if this had been one of the sidewalks in the village away from petitioner's premises. The risk

of slipping upon ice on sidewalks at certain seasons of the year, regardless of whether or not the ice has been negligently permitted to accumulate on the sidewalk, is one to which any person may be subjected whether he works for an interstate carrier or not.

In Volume 10 of the Century Dictionary, at page 6976, the word "work," a noun, is defined as follows:

> "An establishment for manufacturing or for performing industrial labor of any sort; generally in the plural, including all the buildings, machines, etc., used in the required operations; as, ironworks—hence the plural is used as a collective singular, becoming then a singular article as, a large glassworks in the town."

Webster defines "work" (paragraph 6) as

> "a place where industrial labor of any kind is carried on; as a salt work; now esp. in plural form, but often used with singular construction, the structures, grounds, machinery, etc., of a manufacturing establishment, or, loosely, of any industrial concern; as, to visit an iron works; locomotive works; the waterworks of a town."

There are, or in recent years have been, in force in many of the states, statutes known as Employers' Liability Acts, most of which contain the words "ways," "works" or "machinery," and those words, as so used, have been construed by the courts.

Such a statute, in New York, provides that an employer shall be liable for an injury to an employe caused by "any defect in the condition of the ways, works or machinery," due to negligence chargeable to the employer.

In

Ripp v. Fuchs, 113 N. Y. Supp. 361, 364, 129 App. Div. 321,

the Court held that a wall in process of construction was neither "works," "ways" nor "means" within the contemplation of the statute.

In

Davis v. Plant, 138 N. Y. Supp. 145, 146,

construing the same statute, the Court held that a pole with a T-end used for lifting quarters of beef, which were suspended from an overhead track by a wheel and truck, was neither "ways, works, machinery nor plant" within the meaning of the statute.

In

Cahill v. Railroad, 190 Mass. 421,

plaintiff, an employe of the railroad company, went to its freight house to get a skid, to be used in unloading a freight car. He took a skid that was leaning up against a row of cotton bales, and as he removed the skid the bales fell over on him causing injuries for which he sued.

It was held that "the bales of cotton as they were piled or stored in the freight house did not constitute a part of the ways, works or machinery."

In

McGowan v. New York Contracting Co.,
127 N. Y. Supp. 532, 143 App. Div. 1,

plaintiff, employed in a trench, was injured by an explosion of dynamite in one of several holes which had been drilled in the rock through which the trench was being cut, and suit was brought charging, in part, negligence of defendant in not observing the Employers' Liability Act of New York.

In holding that there could be no recovery, the Court said:

> "There is no defect charged with respect to 'works' or 'machinery,' but it is quite clear that there were no 'ways, works or machinery' furnished or provided by the master. It would not do to hold that the rock in which the holes were drilled, and which was being constantly blasted away, was provided by the master as a 'way' for the use of the employes and argument is not needed to demonstrate that neither the rock in which the hole was drilled, nor the dynamite which was inserted in it, was any part of the 'works' or 'machinery' furnished or provided by the master for use in its business."

The Supreme Court of Missouri had occasion to construe this act, with respect to this precise question, in

Elliot v. Payne, 293 Mo. 591, 239 S. W. 851.

In that case a locomotive fireman, while attempting to alight from his engine on a station platform, slipped on some ice on the platform and was fatally injured. His administratrix sued under the Federal Employers' Liability Act, and the Court held that there could be no recovery for the reason that, as to deceased, the station platform was not embraced within the appliances or equipment for a "defect or insufficiency" in which the defendant was charged with liability.

Attention was directed in the opinion to the fact that the first Federal Employers' Liability Act, the Act of 1906, included the word "ways" preceding the word "works" and concluded with the latter word, whereas the present act (the Act of 1908) the word "ways" was omitted and the words "boats, wharves and other equipment."

It was further said that this act undertook to change and modify the common law; that it created liability where there was none at common law; that it destroyed defenses which were recognized at common law; that it made acts of the master negligence which were not his negligence at the common law. The Court then proceeded:

"Suppose the statute (in its second specification of negligence) had stopped with the words 'cars, engines, appliances, track, roadbed,' could it be said that a defective station platform would be an actionable negligent act of a defendant under the statute? We think not, because it would not fall within any of the terms thereof. If not, then there could be no action under the Act of 1908 and its subsequent amendment in 1910 for such neglect or negligence. Congress, as ruled by the courts, had the power to pass the law, and, of course, had the right to limit the things defects in which should constitute negligence. Congress could have limited the law to engines, cars, tracks and roadbeds. If it had, defects in appliances other than those named would not be actionable under the statute. For action thereon the party would be relegated to his common-law rights. In other words, the right to sue under this act is limited to the things mentioned in the law, and if a depot platform maintained chiefly for the general public, rather than the employes of the railroad, does not fall within the act, then there was no actionable negligence. We have indicated above that a depot platform would not fall under the terms 'cars, engines, tracks, roadbed or appliances.' The ordinary meaning of these words is well understood. The remaining words used are 'machinery, works, boats, wharves or other equipment.' It is clear that a depot platform would not fall under the head of either 'machinery,' 'wharves' or 'boats,' so that we have left the words 'works' and 'other equipment' * * *.

"If a depot platform falls within the terms of the federal act at all, it must be that the word 'works,' as

used therein, includes it. If not, it is beyond the purview of the statute."

Discussing the use of the word "works," as used in this act, the Court further said:

"If it was so used there was no use in using the words 'tracks, roadbed or wharves.' If the word 'works' was intended to cover 'all the real estate, buildings and machinery used in the particular business' as held by some state courts under the peculiar wording of their statutes, the Federal Congress should have used the word 'works' and quit. The meaning of the word in this federal act must be measured by the use of it in connection with the other words used. When so used it clearly has reference to working places other than the tracks, roadbed and their incidents. Railroads have repair shops, engine houses, warehouses, railway yards, switch yards and other working places wherein employes may be engaged in work for interstate commerce. It is evidently these places to which the word 'works' applies. It certainly does not apply to a depot platform, except so far as such platform may be used by the particular employe as a working place. The working place of an engineer or fireman is not on a depot platform. A switchman may have his working place in the yards, and other employes have theirs in shops and other working places along the line. But it is evident that a depot platform is not a working place for an engine fireman and therefore not within the term 'works' as used in the statute. So viewing it, we rule that the demurrer to the evidence should have been sustained in the instant case."

The Court further said:

> "A depot platform, so far as its general use by the public is concerned, is largely a passageway from the outside world to the trains of the company, and from those trains to places outside of railroad property. In a very limited sense it may be a working place for certain classes of employes. Those employes whose duties require them to unload passengers, baggage or freight might say that it was a working place, but to other employes it would be a mere way of ingress and egress."

It will hardly be denied that a station platform comes within the idea expressed by the word "ways." Undoubtedly it is a part of the "ways" of a carrier—a place of ingress to, or egress from, the station. We think some significance is to be attached to the fact that in the first Federal Employers' Liability Act (see Appendix) Congress expressly imposed liability upon a common carrier for a defect or insufficiency in its "ways," due to its negligence, whereas, in the present act Congress just as expressly failed to impose such liability.

It will doubtless be contended here that, because of the language used in the last paragraph quoted from the opinion in the Elliott case, supra, that case is authority for the assertion that as to this respondent, the station platform was her working place and therefore within the act.

As to that argument we merely observe that: First, the language quoted was used solely by way of argument or

comparison and was not pertinent to any question submitted for decision. It is merely dictum.

Secondly, the act does not refer to "working places," but to "works."

Thirdly, respondent was not, at the time of her injury, engaged in unloading "passengers, baggage or freight" so that it "might" be said that this platform was, for her, a working place. Her principal working place was in the depot. At the time of her injury and until the train arrived she was not at work and had no duties to perform. To her at that time this plaform was "a mere way of ingress and egress"—a "way"—being so used by her for her own convenience.

It will also be argued, in all probability—the argument was submitted in opposition to the issuance of the writ of certiorari herein—that petitioner is precluded from insisting upon this contention because, in its answer, it admitted that the parties were engaged in interstate commerce and that the train mentioned in respondent's petition was operated between Newport, Arkansas, and Joplin, Missouri. It is also a fact that, as to her general duties, respondent was employed by petitioner in interstate commerce.

Those facts, whether admitted in the pleadings or established by the proof, are not alone sufficient to make the provisions of this act applicable to any case, or to preclude the contention that the rights of the parties are not to be determined by the act.

If the facts alleged in her petition were true respondent was in the discharge of some duty for petitioner at the time of her injury, but, as stated, the evidence established that she neither delivered to, nor received from, the train any express, mail or messages.

Respondent placed the truck in position to receive such matter, if the train had any, for that station. In so far as her work with reference to the receipt of express or mail matter from this train was concerned—no such matter was delivered, for the truck was empty when she placed it—it had been for the moment completed. She had no further duty to perform until the train arrived and because the weather was cold she chose to return to the station to there await the arrival of the train, all for her own convenience (R. 38 and 39). She was not, as she alleged, in the performance of any duty for petitioner at the time of her injury.

We submit, therefore, that for the reasons that a station platform is not within the objects with respect to which petitioner, if negligent, was liable under this act and that respondent, at the time of her injury, was not performing any duty for petitioner, there can be no recovery, under this act, even though the admissions referred to were made, and even though, as said by the Supreme Court, petitioner requested an instruction on contributory negligence. If the reasonable construction of this act does not render it applicable to this case it cannot be made so by admission or by requesting any particular kind of instruction.

Moreover, the record will show, first, the filing of a demurrer to the petition (R. 5); next, an objection to the introduction of any testimony for the same reason as assigned in the demurrer (R. 12), and, finally, the filing of demurrers to the evidence (in effect, motions for directed verdict because of failure of proof entitling plaintiff to recover) at the close of respondent's evidence and again at the close of all the evidence (R. 72 and 104).

According to Missouri practice those proceedings were the usual ones for raising the question of respondent's right to recover under both the pleadings and proof.

Their effect was to deny a right of recovery under this act.

II.

There Is a Failure of Proof of Facts Sufficient to Establish Actionable Negligence Causing Respondent's Injuries.

While we believe that our contention that the act is not applicable to this case will be sustained, we shall from this point argue this case upon the assumption, for the purpose of the discussion only, that it is within the act.

Accordingly, our next contention is that the undisputed evidence wholly fails to establish any actionable negligence which operated as the proximate cause of respondent's injuries, either under the provisions of the act or under applicable rules of the common law.

Referring to this act this Court, in

New York Central Railroad Co. v. Chisholm,
268 U. S. 29,

said:

> "It only undertakes to impose liability for negligence, which must be shown by proof."

In

Seaboard Air Line Railway Co. v. Horton,
233 U. S. 492,

it was said (referring to the first section of this act):

> "This clause has two branches: the one covering the negligence of any of the officers, agents or employes of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the work-

men (cases cited). To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated."

In

Looney v. Railroad Co., 200 U. S. 480,

the Court said:

"A defect cannot be inferred from the mere fact of an injury. There must be substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown. * * * But the negligence of a defendant cannot be inferred from presumption of care on the part of the person killed. A presumption in the performance of duty assists the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

In

Patton v. Railway Co., 179 U. S. 658, l. c. 663,

the Court said:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to estab-

lish that the employer has been guilty of negligence (case cited). Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which he is not, it is not for the jury to guess between those half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which, and with which, the employe is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe (cases cited). He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place, or the machinery."

With respect to the acts or omissions which may be said to constitute actionable negligence, it is immaterial whether the action be under the last clause of the Federal Employers' Liability Act or at common law. Negligence, under the act, merely relates to the objects therein specified. When any of those objects are involved the question of negligence is to be determined by the usual common-law rules of negligence, including knowledge either actual or constructive of the alleged negligent condition; the extent, if any, to which that condition is due to a failure to exercise ordinary care; whether the injury could have been prevented by the exercise of ordinary care and whether the negligence alleged caused the injury.

Now, what are the facts established by respondent's testimony?

When she went to work at this station, some six months before her injury, there was a depression or ditch in front of the entrance to the station which wore "more and more" while she worked there (R. 55).

During all this time it was a part of her daily duties to, and she did, place the truck in position near the tracks, necessitating her moving it and her walking back and forth across this platform. Every morning she stepped across this depression (R. 57).

She was never injured before while attempting to step across this depression and on the occasion of her injury she did not fall because of attempting to step across the ditch.

The cause of her injury was slipping on the ice.

This is her testimony:

> "Q. And as you came along to this trench or ditch or drain, or whatever you call it, you stepped in that and your foot slipped?
>
> A. Yes, sir.
>
> Q. Slipped on the ice that had formed there during the night before?
>
> A. Yes, sir.
>
> Q. And that was what caused you to fall?
>
> A. Yes, sir" (R. 58).

It is undisputed that, at as late as 10 o'clock the night before, this platform was dry and there was no water in this depression. The ice on which respondent slipped formed in this depression during the eight hours between 10 o'clock on the night of January 12 and 6 o'clock in the morning of January 13. During those eight hours no employe of petitioner was near this station except respondent.

This record contains no evidence of any attempt to show that petitioner either knew, or by the exercise of ordinary care could have known, of the accumulation of ice or that any opportunity, within the limits of ordinary or reasonable care, was ever afforded petitioner to remedy the condition and to have thereby prevented respondent's injuries.

We submit, therefore, that, for this reason alone, there should be a reversal of the judgment.

III.

The Undisputed Evidence Discloses That Respondent Assumed the Risk.

If the facts in this case bring it within the provisions of the Federal Employers' Liability Act, then certain principles well settled by the decisions of this Court are applicable, namely: (1) the provisions of that act supersede any state laws or decisions which might otherwise determine the rights of the parties to this suit; (2) the common law, by which the question whether or not respondent assumed the risk is to be determined, is the common law declared by this Court, and not that declared by the state courts, and (3) under numerous decisions of this Court respondent assumed the risk, not only of those injuries ordinarily incidental to her occupation, but also of those injuries which were likely to result from conditions arising from petitioner's negligence, which respondent knew and appreciated, or which were so obvious that, as a reasonably prudent person, she should have known and appreciated. (There is no contention that any statute enacted for the safety of employes was violated by petitioner.)

In

Seaboard Air Line Ry. Co. v. Horton,
233 U. S. 492, l. c. 503-4,

it was held that section 4 of said act, in eliminating the defense of assumption of risk in the cases indicated,

"quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

It was there said:

> "Some employments are necessarily fraught with danger to the workmen—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court" (cases cited).

In the later case of

Boldt, Adm., v. Pennsylvania R. R. Co., 245 U. S. 441, l. c. 446,

this Court said:

> "The risk held to have been assumed in the Horton case certainly arose from negligence of some officer,

agent or employe; and if the negligence of all these should be excluded in actions under the Employers' Liability Act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk."

In

Chicago Rock Island & Pacific Railway Company v. Ward, 252 U. S. 18,

this Court said:

"As to the nature of the risk assumed by an employe in actions brought under the Employers' Liability Act, we took occasion to say, in Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 315, 'According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employes may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.'"

In

Pryor v. Williams, 254 U. S. 43,

this Court reversed a judgment of the Supreme Court of Missouri for the reason that that Court there held, as it held in this case, that the defense of assumption of risk

could not be interposed as a bar to an action brought under the Employers' Liability Act.

In that case respondent Williams, plaintiff in the action, was engaged in tearing down a bridge on the line of the railroad and a defect in a claw bar, which he was directed to use, caused the bar to slip while he was attempting to draw a bolt; in consequence, he lost his balance and fell to the ground, a distance of 12 feet. The defect, it is alleged, Williams did not know. Negligence, however, was charged against him and assumption of risk and contributory negligence.

He was ordered by the foreman in charge of the work to use a claw bar which was defective in that the claws "had become so rounded and dull by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff (Williams) pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground."

The plaintiff testified that to discover the defect required an inspection of the underside of the tool and that, in obeying the order of the foreman, he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

The suit was based upon an alleged violation of provisions of the Federal Employers' Liability Act. Williams recovered and the cause was appealed to the Kansas City Court of Appeals.

The view of the Court was that "the defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff" and that "the risk was just as obvious as the defect; that the tool was a simple one which in the course of use would be expected to fall into such defective condition and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

A majority of the Court reversed the judgment, but because one of the Judges deemed the decision of the majority to be in conflict with a decision of the Supreme Court the case was certified to that court for its determination.

The Supreme Court ruled differently upon the issue of assumed risk, holding that that defense was not available in bar of the action. The case was then brought to this court, where the judgment of the Supreme Court of Missouri was reversed. It was here said:

> "In its view of the federal statute and the defence under it, the Court erred (Seaboard Air Line Railway v. Horton, 223 U. S. 492; Jacobs v. Southern Ry. Co., 241 U. S. 229; Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310; Erie R. R. Co. v. Purucker, 244 U. S. 320; Boldt v. Pennsylvania R. R. Co., 245 U. S. 441).
>
> "And the requirement of the act prevails over any state law (Seaboard Air Line Railway v. Horton, supra; Atchison, Topeako & Santa Fe Ry. Co. v. Harold, 241 U. S. 371; New York Central R. R. Co. v.

Winfield, 244 U. S. 147; New Orleans & Northeastern R. R. Co. v. Harris, 247 U. S. 367)."

Referring to the action of the trial court in refusing an instruction requested by the defendants upon the issue of assumption of risk it was further said:

> "The Court was requested to instruct the jury that the effect of the assumption of risk by Williams, incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability 'for the injury resulting therefrom.'
>
> "The Court refused the instruction as it was requested and amended it by adding thereto 'and such fact (the assumption of risk) will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions.'
>
> "The refusal and modification were assigned as error and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance and, if it existed, only constituted contributory negligence, and could operate only in reduction of the amount of recovery, not defeat recovery. This was error as we have seen."

In

Chesapeake & Ohio Railway Company v. Nixon, 271 U. S. 218,

a recovery for damages was sought under this Act for the death of a section foreman resulting from injuries sus-

tained by him while riding on a velocipede and caused by being struck by a train.

Deceased was an experienced section foreman upon the defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used the velocipede, which was propelled by him.

He had obtained, from his immediate superior, the supervisor of track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at 7 in the morning and at half-past 6 on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed.

In holding that there could be no recovery, this Court said:

> "For reasons that the jury found insufficient to excuse the omission, the engineer and fireman of the train were not on the lookout, and the question raised is whether, as toward the deceased, the defendant owed a duty to keep a lookout, or whether, on the other hand, the deceased took the risk.
>
> "If the accident had happened an hour later when the deceased was inspecting the track we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection

from its employes. (Cases cited.) The duty of the railroad company toward this class of employes was not affected by that which it might owe to others.

"The permission to use the velocipede in going to his work did not make the defendant's obligation to the deceased greater than it would have been after he got there. * * * It was a trifling incident of daily life by which a subordinate officer of the company allowed one lower in grade to enlarge his customary use of the machine by an hour for his own convenience, although even then, in the opinion of the Court of Appeals of Virginia, already engaged in his duties. It seems to us to have been no more than an extension of his ordinary rights and his usual risks."

These rules have been announced by this Court in many cases since the Horton case was decided, among which are the following::

Jacobs v. Southern Railway Co., 241 U. S. 229;
Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310;
Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462;
Chicago, Rock Island & Pacific Ry. Co. v. Ward, 252 U. S. 18;
Erie R. R. Co. v. Purucker, 244 U. S. 320;
Boldt v. Pennsylvania R. R. Co., 245 U. S. 441;
Pryor v. Williams, 254 U. S. 43;
Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218.

In the Jacobs case (241 U. S. 229) the plaintiff was engaged with a crew in shifting cars in the company's yard. He descended from the engine to get drinking water for

himself and the engineer. He returned with a can of water, to mount the engine and tripped on a pile of cinders and fell under the engine. He had often attempted to board engines while they were moving. The cinder pile was about 18 or 24 inches deep. The cinders were right up against the rail and sloped from the rail up. He testified that he knew that the cinders were there, but did not know that it was dangerous, and that, at the moment of his injury, he had forgotten that they were there. In holding that plaintiff was not entitled to recover, this Court said:

> "He admitted a knowledge of the 'material conditions' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them."

In view of the law as declared in these decisions, and assuming, for the purpose of this discussion, that this case comes within the provisions of the Federal Employers' Liability Act, we submit that respondent assumed the risk of injury due to the condition of the station platform complained of, even though, as the Supreme Court of Missouri thought, the testimony may have tended to

establish that such condition existed as the result of petitioner's negligence and, we contend, the testimony of respondent so shows.

Respondent entered the employ of petitioner, at this station, on July 2, 1920, and there continued in service until the 13th of January, 1921, at which time she was injured. Her testimony is that, when she went to work at this place, there was a depression or ditch in front of the door leading to the station, and that it remained there, varying in size at different times, until the date of her injury (R. 55). During all of that time, whenever rain fell, it fell into this depression (R. 28). In response to the question, asked her by her own counsel, as to the cause of this depression or drain, she answered: "By the passage of people passing in and out, and also by the water running in front of the door" (R. 19). Respondent further testified, on her direct examination, that she had observed rains before the day of the accident on the platform; that she had observed that water would run before the door; that the water struck into the platform, and that the platform absorbed the water (R. 28).

On cross-examination she testified that from July, 1920, until January, 1921, rain had fallen on several occasions in that vicinity; that she had observed that when it fell the rain fell from the roof and made this ditch or drain in front of the station; that when the rain would first fall the water would accumulate in front of the station, and then later the ditch would absorb it or it would run

away; that she had often noticed this condition whenever it rained (R. 35).

On recross-examination, respondent testified that this depression got wider and deeper from July, 1920, until January, 1921; that it wore out the last month; that the more rain fell, the deeper it would wear (R. 68); that the rain had washed it out some the night before she was hurt; that the rain washed it deeper that night (R. 69). And again, on recross-examination, she testified that every morning when she was on duty she moved the truck out to the north edge of the platform next to the tracks to meet the morning train (R. 69); that she would move the truck out and then go back to the station and wait for the train; that every morning, when she would go back from the truck to the station, she had to step over this ditch or drain; that she saw water in the drain, and that on occasions, when there was water in the drain, she stepped across it onto the steps leading to the station (R. 70).

When she arose on the morning of the accident she already knew that it had rained during the night. The moment that she stepped out of the station she observed that there were two or three inches of snow on the steps and as far as she could see from the depot; that the snow was all over town; that the two steps leading from the station were covered with snow; that, as she stepped off the steps to walk to the truck, she walked in the snow (R. 39); that, in arriving at the truck, she discovered that

there were snow and sleet on the truck; she saw where it had rained and frozen on the truck before it snowed; she and her companion moved the truck to the edge of the platform nearest the tracks (R. 40); when she came out of the station that morning she knew it was cold and was snowing; that she found out that it had frozen. She first noticed that it had frozen on the truck before she was injured (R. 52).

With respect to her knowledge of the conditions immediately before the accident she testified that she did not know the ice was before the door, but that she did know it had sleeted and snowed (R. 54). She knew the ice had formed on the truck; that it had been cold enough to freeze, and she knew if she stepped on any ice she was likely to slip (R. 54).

From the testimony of respondent the following facts bearing upon the defense of assumption of risk are deducible:

First. That she knew, at the time that she began work at this station, six months before she was hurt, all about the character of construction of the roof of the station and the existence and approximate size of the depression in the platform.

Second. That she was thoroughly familiar with the effect of the construction of the roof and the depression, namely, that when it rained water would accumulate in the depression and that it would remain there before running away or being absorbed by the chats.

Third. That she knew that it had rained shortly before her injury.

Fourth. That she also knew, before she was hurt, and as soon as she stepped out on the platform, that the weather was cold enough to freeze and that ice had formed on the platform and on other objects, such as the truck.

Fifth. That she knew it had snowed and was still snowing.

Sixth. That she was thoroughly familiar with the possibility and probability of slipping if she stepped on ice.

By her testimony she admits knowledge of all these facts. But she says she did not know that there was ice in this depression. Knowing that, whenever it rained, water would accumulate in the depression, and knowing that it **had** rained, and that ice had formed, and that snow was falling on everything on this platform and on the platform itself, is it imposing too great a burden upon this respondent for the law to say that she should, in the exercise of that reasonable care which the law demands of all persons, have known that there was undoubtedly ice in this depression and that, in the exercise of the same care, she had it within her power, and should have used it, to have avoided the possibility of her injury by doing as she had always done theretofore, namely, by taking care to step clear across the depression?

We submit that this question should be answered by a holding that respondent assumed the risks of her employment and cannot therefore recover.

IV.

Respondent's Carelessness Was the Sole Cause of Her Injuries.

We shall spend but little time upon this point.

The law, as declared by this Court, in the cases of Great Northern Railway Co. v. Wiles, 240 U. S. 444; Frese v. Railroad Co., 263 U. S. 1, and Davis v. Kennedy, 266 U. S. 147, is that if an injury is solely due to carelessness of the injured, he cannot recover even under the Federal Employers' Liability Act.

The principle announced in the Davis case, if we understand it correctly, is equally applicable to this case. It was there said:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4 and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act, as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

Here respondent had been practically in sole charge of this station for six months before she was hurt. The depression did not alone cause her to fall. She had daily demonstrated that no danger existed in stepping across it because she performed that very act daily without mishap.

On this occasion instead of stepping clear across it, she stepped and slipped on the ice in it (R. 58).

Whether she had express and formal authority to do so, the fact remains that she herself ordered the section man to remove the snow from this platform the next day and he obeyed her order (R. 40). It is folly to argue that if she considered this depression as at all dangerous she could not have reported the condition in such manner and to such source as to have assured its repair. It, however, remained there during the entire time of her employment without complaint from or report by her, and on the morning of the accident she could have as easily stepped across it as upon any of the other prior occasions, if she had herself been in the exercise of ordinary care. There is no evidence that upon any prior occasion she ever failed to step all the way over it.

In conclusion we call attention to the fact that one of the acts of negligence alleged was failure to sufficiently light this platform. There is a failure of proof not only of that allegation but also of any causal connection between such alleged negligence and respondent's injury and the submission of that allegation as a ground of recovery was not requested by respondent. (See Instruction, R. 106 and 107.)

However, respondent's testimony establishes that, on this morning, the usual lights were burning inside the depot and at the windows; that she had a lantern already

lighted which she could have carried with her while walking across the platform (R. 32 and 33).

It is inferable from all the evidence that the natural light was sufficient to make artificial unnecessary.

At any rate, the same conditions with respect to light existed on this morning as on other days at the same hour (R. 57).

Respondent knew better than petitioner just how dark it was, if it was dark, and whether she needed artificial light. She did not choose to use the artificial light which petitioner furnished—doubtless because it wasn't necessary. However that may be, we contend that she certainly assumed whatever risk existed by reason of alleged insufficient light.

For the various reasons herein discussed, we most respectfully submit that respondent is not entitled to recover and that the judgment of the Supreme Court of Missouri should be reversed.

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